

KEITH DAHL
v.
ASSISTANT PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-108-A

Decided August 28, 1991

Appeal from a decision concerning the awarding of a timber sale contract.

Affirmed.

1. Administrative Procedure: Burden of Proof--Indians: Timber
Resources: Timber Sales Contracts: Generally

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of is erroneous or not supported by substantial evidence.

APPEARANCES: Frank M. Franciscovich, Esq., Aberdeen, Washington, and Dennis J. Whittlesey, Esq., Washington, D.C., for appellant; Michael E. Drais, Esq., Office of the Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Keith Dahl seeks review of a May 8, 1990, decision of the Assistant Portland, Area Director (Program Services), Bureau of Indian Affairs (BIA; Area Director), concerning the awarding of a timber sale contract for the Railroad Creek Logging Unit (logging unit) on the Quinault Indian Reservation, Washington. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

On October 23, 1989, the Superintendent, Olympic Peninsula Agency, BIA (Superintendent), announced a timber sale for the logging unit, which is located on Allotment Nos. 1616, 1652, and 1653, SE¼, sec. 1, and E½, sec. 12, T. 21 N., R. 12 W., Willamette Meridian, Grays Harbor County, Washington, containing 240 acres, more or less. The announcement stated that bids would be received until 2 p.m., local time, November 28, 1989.

Appellant submitted a lump sum bid of \$121,525 for the logging unit on November 28, 1989. On the same day, the Quinault Land and Timber Enterprises (QLTE) 1/ submitted a lump sum bid of \$117,324, expressly reserving its right to meet the high bid. 2/ The logging unit was awarded to QLTE, which had exercised its right to meet the high bid.

Appellant filed a timely notice of appeal of this action. The basis for the appeal was that the bid from QLTE was not filed before the 2 p.m. deadline. Appellant argued:

The wall clock in the BIA upstairs conference room has always been the official timepiece for bid openings. Failure to use this clock is clearly due to the knowledge by BIA employees that [QLTE] was intending to bid but was late. This failure to use the clock that was previously indicated as the official clock violates Appellant's constitutional rights of Due Process and Equal Protection under the laws of the United States, as this was clear discrimination against a non-Indian.

(Appellant's Statement of Reasons at 2).

By letter dated May 8, 1990, the Area Director affirmed the Superintendent's decision. The Area Director stated:

Apparently the only issue in this appeal is which clock was the "official" clock to stop acceptance of bids. * * * Appellant argues a wall clock in the conference room where the bidding took place was the "official" clock. According to this argument the QLTE bid would have been late, so that QLTE could not have exercised its right to meet the high bid. The Superintendent asserts the wrist watch of Nadine Burnett, Olympic Peninsula Agency, Authorized Collector, was designated the "official" clock. Accordingly, the Superintendent asserts the QLTE bid was timely.

(Letter at 3). The Area Director found that Burnett's watch had been designated the official clock, and that QLTE's bid was timely.

1/ QLTE is "a tribal enterprise organized and chartered by the [Quinault Indian Nation] in 1988. QLTE is an entity separate from the Tribe and was created for the purposes of consolidating land ownership interests on the reservation and creating an on-going profit center for forest products on the reservation." Dalhstrom Lumber Co. v. Portland Area Director, 20 IBIA 143, 156 (1991). 2/ This right was set out in a 1988 agreement between QLTE and the Quinault Indian Nation. The agreement was approved by the Area Director and provides in section 4.a: "On allotment lands, [BIA] agrees to the QLTE purchase of advertised sales with the right to meet the high bid where QLTE submits a minimum bid. * * * The QLTE shall have 24 hours to exercise its right to meet the high bid * * *."

The Board received appellant's notice of appeal from the Area Director's decision on June 14, 1990. Both appellant and the Area Director filed briefs on appeal.

Discussion and Conclusions

Appellant contends that the wall clock was always the official timepiece for BIA bid openings, and that it was specifically designated the official timepiece for this particular bid opening. His allegation is not supported by any other individual present at this bid opening. His statement as to the wall clock always being the official timepiece is supported in general by affidavits from two individuals who were not present at this bid opening, and whose presence at prior bid openings was not confirmed. In addition, although an affidavit was submitted by appellant's attorney, allegedly reciting a conversation with a BIA employee that might have supported appellant's position, the employee disputes making the statements attributed to her.

[1] As the Area Director argues, the burden is on appellant to prove error in the Area Director's decision. See, e.g., S & H Concrete Construction, Inc. v. Acting Phoenix Area Director, 20 IBIA 176 (1991), and cases cited therein. Under the circumstances of this case, the Board cannot find that appellant has carried his burden of proving error in the Area Director's decision. 3/

Appellant also contends that BIA "circumvent[ed] the letter and spirit of applicable law and regulations" (Opening Brief at 2) and hampered his ability to present his case by refusing to allow BIA employees to speak privately with or give written statements to either appellant or his attorney. Appellant does not cite any law or regulation which was violated. The Board is aware of no legal requirement that Departmental employees be made available for private questioning by persons engaged in administrative appeals against the Department.

Finally, at page 5 of a supplementary opening brief, appellant requested

that (a) his right to the timber sale at issue be confirmed, (b) BIA conduct in this matter be condemned, (c) sanctions be ordered against the Portland Area Director to the fullest extent possible under this Board's authority and (d) this Board seek further investigation by appropriate officials of the BIA conduct in this matter.

Because the Board has found that appellant has not proven entitlement to the timber sale at issue, it cannot grant appellant's first item

3/ This situation, however, does illustrate the problems that can result when a clock not visible to everyone is used as the official timepiece.

of requested relief. In regard to the remaining items of requested relief, the Board finds that appellant has not shown grounds for condemnation of BIA conduct, sanctions against the Area Director, or further investigation into this matter.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the May 8, 1990, decision of the Assistant Portland Area Director (Program Services) is affirmed.

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge